



[Billing Code 7709-02-P]

## **PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Parts 4001, 4006, 4010, 4041 and 4043**

**RIN 1212–AB34**

### **Miscellaneous Corrections, Clarifications, and Improvements**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

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**SUMMARY:** The Pension Benefit Guaranty Corporation (PBGC) is making miscellaneous technical corrections, clarifications, and improvements to its regulations on Reportable Events and Certain Other Notification Requirements, Annual Financial and Actuarial Information Reporting, Termination of Single-Employer Plans, and Premium Rates. These changes are a result of PBGC’s ongoing retrospective review of the effectiveness and clarity of its rules as well as input from stakeholders.

**DATES:** Comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*] to be assured of consideration.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Email: [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov). Refer to RIN 1212–AB34 in the subject line.
- Mail or Hand Delivery: Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026.

All submissions must include the agency’s name (Pension Benefit Guaranty Corporation, or PBGC) and the Regulation Identifier Number (RIN) for this rulemaking (RIN 1212–AB34).

Comments received will be posted without change to PBGC's website, <http://www.pbgc.gov>, including any personal information provided. Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026, or calling 202-326-4040 during normal business hours. TTY users may call the Federal relay service toll-free at 800-877-8339 and ask to be connected to 202-326-4040.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Cibinic

([cibinic.stephanie@pbgc.gov](mailto:cibinic.stephanie@pbgc.gov)), Deputy Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington DC 20005-4026; 202-326-4400, extension 6352. TTY users may call the Federal relay service toll-free at 800-877-8339 and ask to be connected to 202-326-4400, extension 6352.

**SUPPLEMENTARY INFORMATION:**

**Executive Summary**

*Purpose and Authority*

The purpose of this regulatory action is to make miscellaneous technical corrections, clarifications, and improvements to several Pension Benefit Guaranty Corporation (PBGC) regulations. These changes are based on PBGC's ongoing retrospective review of the effectiveness and clarity of its rules, which includes input from stakeholders on PBGC's programs.

Legal authority for this action comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA. It also comes from section 4006 of ERISA, which give PBGC the authority to prescribe schedules of premium rates and bases for the

application of those rates; section 4010 of ERISA, which gives PBGC authority to prescribe information to be provided and the timing of reports; section 4041 of ERISA (Termination of Single-Employer Plans); and section 4043 of ERISA, which gives PBGC authority to define reportable events and waive reporting.

### *Major Provisions*

The major provisions of this proposed rulemaking would amend PBGC's regulations on:

- Reportable Events and Certain Other Notification Requirements, by eliminating possible duplicative reporting of active participant reductions, clarifying when a liquidation event occurs and providing additional examples for active participant reduction, liquidation, and change in controlled group events.
- Annual Financial and Actuarial Information Reporting, by eliminating a requirement to submit individual financial information for each controlled group member, adding a new reporting waiver and clarifying others, and providing guidance on assumptions for valuing benefit liabilities for cash balance plans.
- Termination of Single-Employer Plans, by providing more time to submit a complete PBGC Form 501 in the standard termination process.
- Premium Rates, by expressly stating that a plan does not qualify for the variable rate premium exemption for the year in which it completes a standard termination if it engages in a spinoff in the same year, clarifying the participant count date special rule for transactions (e.g., mergers and spinoffs), and by modifying the circumstances under which the premium is prorated for a short plan year resulting from a standard termination.

## **Background**

The Pension Benefit Guaranty Corporation (PBGC) administers two insurance programs for private-sector defined benefit pension plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA) — one for single-employer pension plans, and one for multiemployer pension plans. The amendments proposed in this rulemaking apply primarily to the single-employer program.

This proposed rulemaking comes out of PBGC’s ongoing retrospective review program to identify and ameliorate inconsistencies, inaccuracies, and requirements made irrelevant over time. It also responds to suggestions and questions from stakeholders that PBGC receives on an ongoing basis and through public outreach, such as PBGC’s July 2017 “Regulatory Planning and Review of Existing Regulations” Request for Information.<sup>1</sup>

## **Proposed amendments**

The proposed technical and clarifying amendments and improvements to PBGC’s regulations are discussed below. PBGC invites comment on these proposals.

## **Terminology — 29 CFR part 4001**

The proposed rule would amend the general “Definitions” section (29 CFR 4001.2) for terms used in regulations under title IV of ERISA to include the terms “Ultimate parent” and “U.S. entity.” Those terms are currently defined in PBGC’s “Reportable Events and Certain Other Notification Requirements” regulation (29 CFR part 4043), “reportable events regulation,” at §§ 4043.2 and 4043.81(c) respectively. Because proposed amendments to PBGC’s Annual Financial and Actuarial Information Reporting regulation (29 CFR part 4010), “4010 reporting

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<sup>1</sup> 82 FR 34619 (July 26, 2017).

regulation,” would use those same two terms, it is appropriate to move them to the common definitions section in § 4001.2.

### **Reportable Events and Certain Other Notification Requirements — 29 CFR part 4043**

Section 4043 of ERISA requires that PBGC be notified of the occurrence of certain “reportable events” that may signal financial issues with the plan or a contributing employer. The statute provides for both post-event and advance reporting. PBGC’s reportable events regulation implements section 4043 of ERISA.

Reportable events include such plan events as missed contributions, insufficient funds, large pay-outs, and such sponsor events as loan defaults and controlled group changes — events that may present a risk to a sponsor’s ability to continue a plan. When PBGC has timely information about a reportable event, it can take steps to encourage plan continuation. Without timely information about a reportable event, PBGC typically learns that a plan is in danger only when most opportunities for protecting participants and the pension insurance system have been lost.

On September 11, 2015, PBGC issued a final rule,<sup>2</sup> the “2015 Final Rule,” implementing changes to the reportable events regulation. The rule revised longstanding procedures governing when administrators and sponsors of single-employer defined benefit pension plans are required to report certain events to PBGC. The major changes in the 2015 Final Rule tied reporting waivers more closely to situations where a contributing sponsor is at risk of not being able to continue to maintain a plan (i.e., risk of default), revisions to definitions and descriptions of several reportable events, and new requirements on electronic filing. The goal of the 2015 Final Rule was to ease reporting requirements where notice to PBGC is unnecessary but to allow for

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<sup>2</sup> 80 FR 54980 (Sept. 11, 2015).

possible earlier PBGC intervention where there is an opportunity to help sponsors maintain a plan or otherwise preserve benefits for participants.

Since publication of the 2015 Final Rule, PBGC has further identified some opportunities to improve the reportable events and notification requirements by filling in gaps where guidance is needed, simplifying or removing language, codifying policies, and providing examples.

#### *Commercial Measures Criterion*

Section 4043.9(e) of the reportable events regulation describes the commercial measures waiver that is available for certain events.<sup>3</sup> This waiver is available where a company that is a contributing sponsor of a plan has adequate capacity to meet its obligations as evidenced by satisfying a combination of certain criteria. Among the criteria listed, the commercial measures criterion requires that the company's probability of default on its financial obligations be no more than 4 percent over the next 5 years or 0.4 percent over the next year, as "determined on the basis of widely available financial information on the company's credit quality."

The preamble to the 2015 Final Rule made clear that the commercial measures criterion was to be met by looking to third party information and not, for example, information that a company itself generates but that might be considered "widely available" because the information is posted on the company's website.<sup>4</sup> However, the regulatory text in the 2015 Final Rule did not explicitly mention third party information. To remove any ambiguity, the proposed rule would amend § 4043.9 to make clear that a plan must use third party financial information to satisfy the criterion for the company financial soundness safe harbor.

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<sup>3</sup> The five events are as follows: active participant reduction, substantial owner distributions, controlled group changes, extraordinary dividends, and benefit liabilities transfers.

<sup>4</sup> See 80 FR 54986.

### *Active Participant Reduction*

Under § 4043.23 of the reportable events regulation, an active participant reduction reportable event generally occurs when, as a result of a single-cause event or through normal attrition of employees (described below), the number of active participants in a plan is reduced below 80 percent of the number at the beginning of the year (one-year lookback) or below 75 percent of the number at the beginning of the prior year (two-year lookback). The regulation distinguishes between reductions caused by single cause events and normal attrition events. If active participants cease to be members of a plan's controlled group due to a single cause event, such as a reorganization or layoff, the plan administrator and contributing sponsor must file a notice with PBGC within 30 days after the threshold is breached, unless a waiver applies. Conversely, if the active participant reduction is caused by the normal comings and goings of employees or other smaller scale reductions (i.e., normal attrition), notice of the event is extended until the premium filing due date for the plan year following the event year.

Since publication of the 2015 Final Rule, PBGC has received questions from practitioners, including in a comment to its 2017 RFI on Regulatory Planning and Review of Existing Regulations (see the "Background" section of this preamble), about whether a plan administrator or contributing sponsor that files a single-cause event notice must also file an attrition event notice at a later date due to the same active participant reduction. Upon review, PBGC recognizes that § 4043.23 could be interpreted in this manner, though this was not PBGC's intent.

To address this issue, PBGC proposes to amend § 4043.23(a)(2) by altering the current method of counting active participants after the end of the plan year in determining whether an attrition event has occurred by taking into account the number of active participants that had

already been the subject of a single-cause event report in the same plan year. Thus, to determine whether an attrition event has occurred, the number of active participants who ceased to be active and were covered by a single-cause event reported in the same year would be included in the year-end count. This proposed new method of counting would prevent duplicative reporting by disregarding the earlier single-cause event if already reported to PBGC.

The proposed rule also would make clear that multiple single-cause events during the plan year must be reported separately. Thus, each time a new single-cause event results in an active participant reduction greater than 20 percent over the number of active participants at the beginning of the plan year, a new Form 10 would be required to be filed. PBGC is making this clarification because PBGC believes that dramatic reductions due to different events in the same year could signal that the plan sponsor's ability to maintain the plan is rapidly deteriorating.

For further explanation, the proposed rule includes examples in the regulatory text of the interplay between single-cause and attrition events, as well as a single-cause event that occurs over a period of time.

The proposed rule would make non-substantive changes to the formula for counting a single-cause event in § 4043.23(a)(1) that PBGC believes is clearer, more aligned to the proposed language in § 4043.23(a)(2) described above, and easier to use.

To further reduce burden, the proposed rule would eliminate the two-year lookback requirement. With a few years' experience under the 2015 Final Rule, PBGC has concluded that the one-year/80 percent test provides sufficient information and undertaking the additional burden of conducting the two-year/75 percent lookback is not necessary. Thus, the language regarding the two-year lookback in § 4043.23(a)(1) and (2) would be removed under the



proposed rule. To address the statutory requirement, the proposed rule would waive notice of the two-year lookback provided under section 4043(c)(3) of ERISA.

Other proposed changes to § 4043.23 include amending the current definition of “active participant.” The current definition provides that an active participant means, among other things, a participant who “is receiving compensation for work performed,” but does not address whether a participant becomes inactive if the participant leaves a controlled group member for employment by another member of the same controlled group. The proposed rule would clarify that a participant is active if the participant receives compensation from any member of the plan’s controlled group for work performed for any member of the plan’s controlled group. The proposal thus would remove any ambiguity in the determination rules if the participant is employed by any member within the same controlled group.

Finally, PBGC proposes to clarify that reporting an active participant reduction under § 4043.23 would be disregarded if the reduction was already reported under section 4062(e) and/or 4063(a) of ERISA. The current regulation provides that a reduction in the number of active participants may be disregarded if the reduction is timely reported to PBGC under section 4063(a) of ERISA but does not specify when the report must be made in relation to a Form 10 Report under § 4043.23 for the disregard provision to be available. PBGC’s intent in providing the waiver was to prevent duplicative reporting for the same event where notice had previously been filed. To codify PBGC’s intent, the proposed rule would clarify that reporting a reduction in the number of active participants under § 4043.23 may be disregarded if the reduction is reported under section 4062(e) and/or 4063(a) of ERISA before the filing of a notice is due under § 4043.23.

### *Inability to Pay Benefits When Due*

In general, a reportable event occurs under § 4043.26 of the reportable events regulation when a plan fails to make a benefit payment timely or when a plan's liquid assets fall below the level needed for paying benefits for six months. The 2015 Final Rule modified § 4043.26(a)(1)(iii) so that a plan is not treated as having a "current inability" to pay benefits when due if, among other things, the failure to pay is caused solely by "any other administrative delay, including the need to verify a person's eligibility for benefits, to the extent that the delay is for less than the shorter of two months or two full benefit payment periods." In modifying the regulation, the 2015 Final Rule inadvertently imposed a time limit for verification of a person's eligibility for benefits. PBGC recognizes that employers may need more than the specified time limit to verify a person's eligibility for benefits and that such a circumstance is not indicative of a possible need for plan termination.

To resolve this issue, PBGC proposes to amend § 4043.26 to clarify that an inability to pay benefits when due caused by the need to verify eligibility is not subject to the time limit imposed for other administrative delays.

### *Change in Contributing Sponsor or Controlled Group*

Under § 4043.29 of the reportable events regulation, a reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons' ceasing to be members of the plan's controlled group. PBGC has continued to receive inquiries about when a reportable event is triggered under § 4043.29. For instance, although the heading of § 4043.29 includes "a change in contributing sponsor," the regulatory text does not. A 1996 rulemaking added a new reportable event for transactions that result in any person ceasing to be a member of the plan's controlled group, amending the then existing regulation that required reporting only if

there was a change in the contributing sponsor.<sup>5</sup> The 1996 rule, a product of negotiated rulemaking, left out a specific reference to contributing sponsors, though PBGC did not intend that changes in contributing sponsors would no longer be reportable.

Thus, PBGC proposes to modify the event definition to make clear that reporting would be required when a transaction results in one or more persons ceasing to be either a contributing sponsor of a plan, or a member of the plan's controlled group (other than by merger involving members of the same controlled group). The current exception to the reporting requirement for transactions that will solely result in a reorganization involving a mere change in identity, form, or place or organization (however effected), would apply under the proposed rule to only "change in controlled group" transactions. A reorganization such as this that involves a controlled group member that is not a contributing sponsor does not pose a significant risk to the pension insurance system. However, PBGC does need to know about any change to a contributing sponsor, since it is a contributing sponsor that primarily supports the pension plan.

The proposed rule also would revise the first example in the existing regulation to provide greater clarity on the timing of, and responsibility for, filing a report. In addition, the proposed rule would add two new examples—one regarding dissolution of a controlled group member and one describing a merger of controlled group members. These examples illustrate some common situations implicated by the requirements in § 4043.29.<sup>6</sup>

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<sup>5</sup> See Reportable Events; Annual Report, 61 FR 38409 (July 24, 1996) for a description of the amendment, which was adopted without modification in the final rule (61 FR 63988 (Dec. 2, 1996)).

<sup>6</sup> These examples also incidentally illustrate the importance to PBGC of identifying whether value is leaving the controlled group in analyzing whether a transaction poses a risk to the plan and the pension insurance system. When value (e.g., business or revenue generating assets of a sponsor) leaves a controlled group, the loss may raise a concern about the ability of a sponsor to make contributions to, or otherwise be able to maintain, a plan. The example on dissolution of a controlled group reflects value leaving the controlled group while the example on a merger of controlled group members reflects value remaining in the controlled group (hence PBGC's interest in being notified in the former situation but not the latter).

## *Liquidation*

Section 4043.30(a)(1) of the reportable events regulation states that a reportable event occurs for a plan when a member of the plan's controlled group "is involved in any transaction to implement its complete liquidation (including liquidation into another controlled group member)." In discussing this provision with practitioners over the years, it has become clear that this event description could benefit from greater clarity and precision, particularly with respect to what "involved in any transaction to implement" a liquidation means and when the event was triggered.

One liquidation scenario that commonly causes confusion involves a company that ceases operations and sells substantially all of its assets over a period of time. The company continues to sponsor a plan but with no business income, benefits stop accruing and no further plan contributions from the company are made. The result is a "wasting trust" where assets are depleted over time to make pension payments but no new contributions are made for future payment obligations. PBGC observes that because the plan has not been terminated, the company does not realize a reportable event has occurred. Although a cessation of business operations is not in and of itself a liquidation, because the cessation is tied to a sale of substantially all of the business' assets, with the intent to settle remaining obligations, PBGC views a cessation in this context as part of the liquidation process.

When a company fails to notify PBGC that the company ceased business operations and began a liquidation, PBGC encounters greater difficulties in effectively intervening to protect plan assets and participant benefits, thereby increasing the potential for decreased employer funding for the plan and greater potential strain on the pension insurance system. In some cases, PBGC did not become aware of the process of liquidation until years later, when the best

opportunity for protecting plan assets and participant benefits had passed. Liquidations of the type that concern PBGC may take a myriad of forms and be implemented over long periods of time.

To alleviate confusion and improve precision, PBGC proposes to clarify the definition of liquidation to state that a liquidation event occurs when a member of the plan's controlled group "resolves to cease all revenue-generating business operations, sell substantially all its assets, or otherwise effect or implement its complete liquidation (including liquidation into another controlled group member) by decision of the member's board of directors (or equivalent body such as the managing partners or owners) or other actor with the power to authorize such cessation of operations or a liquidation." Hence, a cessation of operations, such as the example above, would trigger a reportable event under § 4043.30. The proposed rule includes the word "revenue-generating" to qualify a cessation of business operations in acknowledgement of the fact that various administrative activities may continue during the winding down of a business. The use of the word "revenue-generating" is therefore designed to capture the fact that a company is not earning revenue to enable it to support the pension plan.

The decision to liquidate can have serious implications for participants and the pension insurance system. Given that PBGC's success in such cases is often directly correlated with reporting an event when there is still time to preserve plan assets, PBGC believes triggering a reporting obligation to the time a decision by the person(s) or body (such as a board of directors) that has the authority to determine that a company will liquidate will be most protective of participants and the pension insurance system. Since a liquidation may or may not involve a formal plan, a written agreement to sell assets to a single buyer, or a series of sales over time to maximize proceeds, the language in the proposed rule represents as close as possible to a

uniform trigger for reporting of liquidation events. PBGC believes that in the vast majority of cases, the decision to liquidate must go through a formal approval or authorization process. Even in cases where the plan sponsor is a company owned by a single person and board formalities do not exist, a moment occurs when that owner has made the decision to move forward with a liquidation. This decision is the common point of departure for liquidations to move forward. For reference and further clarity, PBGC has included in the proposed rule three additional examples, regarding a liquidation within a controlled group, occurring by cessation of operations, and through an asset sale.

Companies that liquidate as a result of insolvency are required to report both events to PBGC under § 4043.30 and § 4043.35 of the reportable events regulation. However, given the similarities between the two events, PBGC believes that reporting to PBGC under either section (instead of both) would be sufficient notification. Thus, PBGC is proposing an additional waiver that would provide relief from the possibility of duplicative reporting under a § 4043.30 liquidation or a § 4043.35 insolvency. The proposed rule would provide parallel waivers in both § 4043.30 and § 4043.35 to clarify that notice would be waived if notice has already been provided to PBGC for the same event under the former section.

PBGC does not intend to compel public company sponsors to disclose liquidations on a Form 10 before notifying the public. Thus, the proposed rule includes an extension under § 4043.30(c) to file the post-event reportable events notice until the earlier of the timely filing of an SEC Form 8-K disclosing the event or the issuance of a press release discussing it.

PBGC specifically requests comment on whether PBGC should make this extension available for foreign private issuers and if so, how. For example, should the regulation allow an extension to file a reportable events notice involving a foreign private issuer that is a plan

sponsor until the earlier of the timely filing of a Form 6-K disclosing the event or the issuance of a press release discussing it, even if the country of incorporation for the foreign private issuer would not require reporting as timely as is required on a Form 8-K for the same event had the issuer been a U.S. filer?<sup>7</sup>

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<sup>7</sup> For more information on Securities and Exchange Commission filing obligations for foreign private issuers, see the discussion at <https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml> (including Form 6-K under section III.B.3. Periodic and Ongoing Reporting Obligations; Other Reports).

### *Public company waiver*

Five reportable events<sup>8</sup> may be waived if any contributing sponsor of the plan (before the transaction that caused the event) is a public company, and the contributing sponsor timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K, except under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits). As explained in the 2015 Final Rule, PBGC found that SEC filings provide timely and adequate information to PBGC with respect to the five events because these events are either required to be reported under a specific Form 8-K item or because they are material information for investors. Therefore, PBGC didn't need to compel reporting of these events under the reportable events regulation.

The proposed rule does not make any changes to the public company waiver. However, in response to questions from practitioners since publication of the 2015 Final Rule, PBGC requests comment on whether the waiver should be expanded to apply in situations where a parent company timely files a Form 8-K but is not a contributing sponsor to the plan. Specifically, would the Form 8-K filing by a parent company that isn't a contributing sponsor provide adequate information to PBGC with respect to each of the five events to which the waiver applies?

### **Annual Financial and Actuarial Information Reporting — 29 CFR part 4010**

Section 4010 of ERISA requires the reporting of actuarial and financial information by controlled groups with single-employer pension plans that have significant funding problems. It also requires PBGC to provide an annual summary report to Congress containing aggregate

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<sup>8</sup> These five post-event filings are (1) active participant reduction, (2) distribution to a substantial owner, (3) change in contributing sponsor or controlled group, (4) extraordinary dividend or stock redemption, and (5) transfer of benefit liabilities.



information filed with PBGC under that section. PBGC’s “4010 reporting regulation” (29 CFR part 4010) implements section 4010 of ERISA.

### *Definitions*

Section 4010.2 of PBGC’s 4010 reporting regulation contains the terms used in part 4010 and their definitions. The proposed rule would amend this “Definitions” section to include the term “Foreign entity,” which is used in proposed amendments to § 4010.9 describing the financial information a filer is required to provide to PBGC. The proposed definition is similar to the definition of “Foreign entity” in § 4043.2 of PBGC’s reportable events regulation. The only difference is that “information year” replaces “date the reportable event occurs” in part (3) of the definition so that part (3) is satisfied for 4010 purposes if one of three tests are met for the fiscal year that includes the information year.

The proposed rule also would add to the list of common terms referenced in § 4010.2 the two terms it would define in the general definitions section of PBGC’s regulations (§ 4001.2). As explained above, under “Terminology — 29 CFR part 4001,” those terms would be “Ultimate parent,” and “U.S. entity.”

### *Filers*

Section 4010.4 of the 4010 reporting regulation prescribes who is a filer. Paragraph (e) of this section explains how reporting is applicable to plans to which special funding rules apply. This paragraph provides that except in connection with the actuarial valuation report, the special funding rules under sections 104 and 402(b) of PPA (applicable to multiple employer plans of cooperatives and charities, and plans of commercial passenger airlines and airline caterers, respectively) and under the Cooperative and Small Employer Charity Pension Flexibility Act of

2013, are disregarded for all other 4010 purposes. The proposed rule would remove from paragraph (e) the reference to PPA section 104 because it has expired.

### *Identifying Information*

Section 4010.7 of the 4010 reporting regulation describes what types of identifying information each filer must provide as part of its reporting. Paragraph (a)(1) of this section specifies what information is required to be included about current members of the filer's controlled group, such as identifying the legal relationships of each controlled group member to the other members. Filers identify the legal relationships by manually entering a description, e.g., parent, subsidiary, for each member. Identifying the legal relationships of controlled group members in this way can be burdensome to filers in larger controlled groups and does not provide a clear picture of the controlled group structure, frustrating the intent of this information.

The proposed rule would provide a simple method for filers in larger controlled groups to satisfy the requirement in paragraph (a) of this section. Instead of entering "parent," "subsidiary," or other relationship, filers with more than 10 controlled group members would submit with their filing an organizational chart or other diagram showing the relationship of the controlled group members to each other. PBGC's understanding is that most filers have such diagrams. Also, filers may already include such diagrams in reportable events filings (29 CFR part 4043) to satisfy the requirement specified in those instructions for a description of the controlled group structure. PBGC believes that requiring a diagram for these larger groups would be less burdensome to provide and would more clearly show the controlled group structure.

### *Plan Actuarial Information*

Section 4010.8 of the 4010 reporting regulation prescribes the plan actuarial information a filer must provide. Paragraph (d)(2) of this section sets the actuarial assumptions and methods to use for determining a plan's benefit liabilities. PBGC has heard from practitioners that the assumptions in paragraph (d)(2) as they apply to cash balance pension plans are not clear and don't specify how these plans should convert a lump sum payment (which is the assumption used by most cash balance plans) to an annuity form. The proposed rule would provide needed guidance with respect to cash balance plans on these assumptions and make a change in the paragraph's overall structure to improve clarity.

The proposed rule would reorganize § 4010.8(d)(2) and combine the actuarial assumptions under paragraphs (d)(2)(i) through (ii) of this section into a table. The table would include as number (5) the assumptions to use for valuing benefit liabilities for cash balance plans. Cash balance plan filers must convert account balances to annuity forms of payment using the rules under section 411(b)(5)(B)(vi) of the Code and 26 CFR 1.411(b)(5)-1(e)(2) that specify the interest crediting rate and annuity conversion rate upon plan termination. In other words, for purposes of reporting benefit liabilities, a cash balance plan would be treated as if terminated and lump sums converted to annuity payments using the assumptions in the applicable U.S.

Department of the Treasury regulation cited to above.

The proposed edits to paragraph (d)(3) of this section focus on improved readability and conformed citations to ERISA and the Code.

### *Financial Information*

Section 4010.9 of the 4010 reporting regulation prescribes the financial information a filer must submit to PBGC for each member of the filer's controlled group. Paragraph (b) of this

section permits a filer to submit consolidated financial statements if the financial information of a controlled group member is combined with the information of other members in a consolidated statement. However, if consolidated information is reported, paragraph (b)(2) requires that revenues, operating income, and net assets for each controlled group member also be reported.

In PBGC's 2017 Request for Information (RFI) on Regulatory Planning and Review of Existing Regulations (noted in the "Background" section of this preamble), a commenter stated that some filers have difficulty trying to identify and collect the three types of information under § 4010.9(b)(2) for each controlled group member and recommended that PBGC modify the regulation to request this detailed information only when necessary as part of reviewing the plan and controlled group financial statements. PBGC considered the comment, and after reviewing the information it collects for 4010 purposes, PBGC believes it can adequately assess risks to participants and plans without this detailed information, and by using additional "off-the-shelf" information as noted in the following paragraph. Therefore, the proposed rule would eliminate that requirement in paragraph (b)(2) of § 4010.9.

PBGC proposes to make another change to paragraph (b) of this section to clarify what financial information must be provided for controlled group members that are U.S. entities where the ultimate parent is a foreign entity. In addition to the consolidated statements for the whole controlled group, the filer must submit financial information on only the U.S. entities that are members of the controlled group. This information could be submitted in consolidated statements. Otherwise, the filer must provide the separate audited (or unaudited) financial statements (or tax returns if financial statements are not available) for controlled group members that are U.S. entities.

Lastly, § 4010.9 allows filers to direct PBGC to where PBGC can find required financial information that is publicly available (in lieu of submitting that information to PBGC).

Paragraph (d) of this section on “submission of public information” provides that a filer may submit a statement indicating when the financial information was made available to the public and where PBGC may obtain it. In PBGC’s experience, these statements have led to general web sites, but not specific web pages where the information required to be reported can be found. Therefore, the proposed rule would clarify how to indicate where public financial information is located. The clarification would state that filers provide the web address (URL) and title of the web page. The example in paragraph (d) of a Securities and Exchange Commission filing is clarified accordingly.

#### *Waivers*

Reporting under section 4010 of ERISA is required if any one of three conditions is met. However, PBGC can waive reporting under its 4010 reporting regulation and does so in three situations (with discretion to waive in others) under § 4010.11 of the regulation.

A condition triggering reporting is that the funding target attainment percentage (FTAP) at the end of the preceding plan year, of a plan maintained by the contributing sponsor or any member of its controlled group, is less than 80 percent (the “80-percent FTAP Gateway Test”). Section 303(d)(2) of ERISA and section 430(d)(2) of the Code provide that in determining the FTAP of a plan for a plan year, plan assets are reduced by the amount of the plan’s funding balance. Plan sponsors are permitted under section 303(f) of ERISA and section 430(f) of the Code to make certain elections to use, increase, or reduce a funding balance effective at the beginning of the plan year. Because of timing, a funding balance election that is made late may be the sole cause of a plan having a 4010 FTAP of less than 80 percent. Practitioners have asked

if PBGC would recognize for purposes of the 80-percent FTAP Gateway Test an untimely funding balance election.

In response, and based on a review of its experience, PBGC proposes to recognize a late funding balance election for this purpose. The proposed waiver would clarify that reporting is not required where a plan makes a late election to reduce a funding balance, and the plan's FTAP for 4010 purposes would have been greater than or equal to 80 percent had the election been timely made.

PBGC also proposes to modify two of the existing three reporting waivers in § 4010.11 of the regulation. PBGC automatically waives reporting where: (a) the aggregate funding shortfall is not in excess of \$15 million; (b) the aggregate participant count is less than 500; or (c) the sole reason filing would otherwise be required is because of either a statutory lien resulting from missed contributions over \$1 million or outstanding minimum funding waivers exceeding the same amount, provided the missed contributions or applications for minimum funding waivers were previously reported to PBGC.

Practitioners have raised with PBGC that, while it is clear under the 80-percent FTAP Gateway Test that only plans maintained by the controlled group on the last day of the information year are considered in determining whether that test is met, the same is not clear under § 4010.11 in determining whether either of the first two waivers apply. Without specifying "on the last day of the information year," the language of the aggregate funding shortfall waiver in paragraph (a) and the waiver for smaller plans in paragraph (b) of § 4010.11, could be interpreted to mean that plans maintained at any time during the plan year must be included in the determination of whether the waiver applies. This is not the interpretation that PBGC intended or believes is reasonable in light of the standard in the 80-percent FTAP

Gateway Test. PBGC agrees that a clarification would be helpful. Therefore, the proposed rule would modify paragraphs (a) and (b) of § 4010.11 to insert “on the last day of the information year.”

Practitioners have also asked when at-risk assumptions are to be used to calculate the funding target (see section 303(i) of ERISA and section 430(i) of the Code for special rules for at-risk plans) for purposes of the 4010 funding shortfall and waiving reporting where a plan’s aggregate funding shortfall is \$15 million or less. In response, the proposed rule would revise paragraph (a)(1)(i) of § 4010.11 to provide that a plan is not required to use at-risk retirement and form of payment assumptions to determine the funding target used to calculate the 4010 funding shortfall unless the plan is in “at-risk status” for funding purposes. This follows a similar clarification that had been made to the rules describing assumptions for determining the premium funding target under PBGC’s premium rates regulation, § 4006.4(b)(3).

#### **Termination of Single-Employer Plans — 29 CFR part 4041**

A single-employer plan covered by PBGC’s insurance program may be voluntarily terminated only in a standard or distress termination. The rules governing voluntary terminations are in section 4041 of ERISA and PBGC’s regulation on Termination of Single-Employer Plans (29 CFR part 4041), “termination of single-employer plans regulation.”

### *Post-Distribution Certification*

ERISA requires the plan administrator of a plan terminating in a standard termination to certify to PBGC that the plan's assets have been distributed to pay all benefits under the plan. Certification under section 4041(b)(3)(B) of ERISA must be made within 30 days after the final distribution of assets is completed.

Section 4041.29 of the termination of single-employer plans regulation requires plans to submit by the 30-day statutory deadline a "post-distribution certification" (i.e., PBGC Form 501). PBGC has heard from practitioners that it is sometimes challenging to collect all of the information required to be submitted as an attachment to Form 501 within the prescribed timeframe (e.g., documentation that benefit obligations were settled for all participants including copies of cancelled checks in the case of lump sum distributions) and have asked whether PBGC could extend the certification deadline.

While PBGC cannot extend a statutory deadline, the proposed rule would amend paragraph (a) of § 4041.29 to provide an alternative filing option for plan administrators who need more time to complete the PBGC Form 501. This proposed alternative would permit a plan administrator to submit a completed PBGC Form 501 within 60 days after the last distribution date for any affected party if the plan administrator certifies to PBGC that all assets have been distributed in accordance with section 4044 of ERISA and 29 CFR part 4044 (in an email or otherwise, as would be described in the instructions to the Form 501) within 30 days after the last distribution date for any affected party.

Paragraph (b) of this section and paragraph (d)(2) of § 4041.30 (requests for deadline extensions) would be revised accordingly to account for the proposed changes to § 4041.29(a).



## **Premium Rates — 29 CFR part 4006**

Under sections 4006 and 4007 of ERISA, plans covered by the termination insurance program under title IV of ERISA must pay premiums to PBGC. Section 4006 of ERISA deals with premium rates, including the computation of premiums, and PBGC's regulation on Premium Rates in 29 CFR part 4006, "premium rates regulation," implements section 4006 of ERISA.

### *Determination of Unfunded Vested Benefits — Plans to Which Special Funding Rules Apply*

Section 4006.4 of the premium rates regulation, which provides rules for determining unfunded vested benefits, states in paragraph (f) that plans subject to special funding rules must disregard those rules and determine unfunded vested benefits for premium purposes in the same manner as all other plans. Section 4006.4(f) refers to the special funding rules under sections 104, 105, 106, and 402(b) of the Pension Protection Act of 2006, Public Law 109-280 (PPA), that are applicable to multiple employer plans of cooperatives and charities, PBGC settlement plans, plans of government contractors, and plans of commercial passenger airlines and airline caterers.

The proposed rule would remove references to PPA sections 104, 105, and 106 because those provisions have expired. It would add a reference to subsequent law that permanently established special funding rules for multiple employer plans maintained by certain cooperatives and charities (the Cooperative and Small Employer Charity Pension Flexibility Act of 2013, Public Law 113-97).

### *Variable-Rate Premium Exemptions; Plans Terminating in Standard Terminations*

In general, a single-employer plan pays a variable-rate premium (VRP) for the plan year ten-and-a-half months after the plan year begins based on the level of the plan's underfunding at

the beginning of the plan year. In 2014, as part of PBGC's regulatory review process, PBGC amended its premium rates regulation to provide for a VRP exemption for the year in which a plan completes a standard termination. PBGC adopted this exemption because it did not seem appropriate to require a terminating plan to pay a VRP based on the underfunding at the beginning of the year when, by the time the premium was due (or shortly thereafter), the sponsor had fully funded the plan and distributed all accrued benefits (i.e., purchased annuities or paid lump sums) and PBGC coverage had ceased.<sup>9</sup>

PBGC has received questions from practitioners as to whether a plan qualifies for this "final year" exemption if a large number of participants are spun off to a new plan or transferred to another existing plan during the year in which the termination is completed. It has been suggested that, if the exemption applies, a plan sponsor could significantly reduce its VRP because the transferor plan would not owe any VRP for its final year and the transferee plan would owe, at most, a pro-rata VRP for the plan year in which the transfer occurs.<sup>10</sup> However, the VRP exemption does not apply in this type of transaction because the benefits of most of the participants who were in the plan at the beginning of the year would not be fully funded or paid in full, and for those participants, PBGC coverage would still be in effect. PBGC added language to the 2018 premium filing instructions to highlight to filers that the VRP exemption does not apply in such cases.

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<sup>9</sup> Before 2014, the standard termination VRP exemption in § 4006.5(a)(3) was available only if the proposed date of termination was in a prior year, but the plan had not yet completed the close-out by the end of that year. The 2014 change expanded that exemption to include plans that are able to complete the termination within one plan year. *See* 79 FR 13547, 13553 (March 11, 2014).

<sup>10</sup> If the transferee plan is an existing plan, the additional underfunding resulting from the transfer would not be reflected in its VRP because underfunding for VRP purposes is measured at the beginning of the year. If the transferee plan is a new plan, it would owe only a pro-rata VRP (see § 4006.5(f)(1)).

In light of these questions, PBGC is proposing to amend § 4006.5(a)(3) of the premium rates regulation to expressly state that a plan does not qualify for the VRP exemption for the year in which a plan completes a standard termination if the plan engages in a spinoff during the premium payment year. The proposed rule would make an exception where the spinoff is de minimis pursuant to the regulations under section 414(l) of the Internal Revenue Code (the Code), i.e., generally fewer than 3 percent of the assets are spun off.

To distinguish cases where the termination has not yet been completed, the proposed changes would move the exemption for certain plans in the process of completing a standard termination initiated in a prior year from § 4006.5(a)(3) to § 4006.5(a)(4) of the premium rates regulation.

#### *Participant Count Date; Certain Transactions*

To determine the flat-rate premium for a plan year, participants are counted on the “participant count date,” generally the day before the plan year begins. Changes in the participant count during the plan year do not affect that year’s flat-rate premium. Under the premium rates regulation, a special rule (§ 4006.5(e)) shifts the participant count date to the first day of the plan year in specified situations that take place at the beginning of a plan year so that the change in participant count is recognized immediately (rather than a year later). Situations where the special rule applies include:

- The first plan year a plan exists.
- A plan year in which a plan is the transferor plan in the case of a beginning of year non-de minimis spinoff.
- A plan year in which a plan is the transferee plan in the case of a beginning of year non-de minimis merger.

For example, consider a scenario where Plan A, a calendar year plan, spins off a group of participants (and the corresponding assets and liabilities) into new Plan B at the beginning of Plan A's 2018 plan year (assume the spinoff is not de minimis). Because of the special rule, both plans count participants on the first day of the year which means Plan B owes a 2018 flat-rate premium on behalf of the transferred participants, but Plan A does not.

PBGC has received questions from practitioners as to whether the special rule applies to the transferee plan in a situation where spun off participants are transferred to an existing plan instead of a new plan. These practitioners believed the premium filing instructions could be interpreted to provide that the special rule does not apply to the transferee plan in this plan-to-plan transfer. However, that interpretation would lead to an inconsistent result.

For example, assume that instead of spinning off participants into a new plan, Plan A (in the above example) had transferred those participants to a pre-existing Plan C (also a calendar year plan) at the beginning of Plan C's 2018 plan year. As noted above, the special rule would apply to Plan A, so Plan A would not include the transferred participants in its participant count. But, if the special rule does not apply to Plan C (i.e., to the transferee plan), Plan C would count participants on the day before the transfer. That would mean that neither Plan A nor Plan C would owe flat-rate premiums on behalf of the transferred participants for 2018.

PBGC is proposing to amend the special rule in paragraph (e) of § 4006.5 to clarify that, in such plan-to-plan transfers, the participant count date of the transferee plan shifts to the first day of its plan year. As a result, it is clear that the transferee plan would owe flat-rate premiums on behalf of the transferred participants. This provision generally would operate where both plans have the same plan year and the transfer takes place at the beginning of the plan year.

As noted above, the special rule also applies where a plan is the transferee plan in the case of a beginning-of-year non-de minimis merger. For example, if two calendar year plans merge at the beginning of 2018, the surviving plan's participant count date is shifted to January 1, 2018. As a result, the surviving plan owes 2018 flat-rate premiums on behalf of the participants who were previously in the transferor plan.

PBGC exempted de minimis mergers from this special rule because PBGC felt the burden resulting from shifting the participant count date was not justified in the case of a de minimis merger because the number of participants for whom neither plan would owe a flat-rate premium would be relatively small (i.e., the regulations under section 414(l) of the Code provide that a merger is de minimis where the liabilities of the smaller plan are less than 3 percent of the assets of the larger plan).

PBGC has received questions from practitioners as to whether this de minimis exemption applies where the surviving plan is the smaller plan. It has been suggested that, if the exemption applies, a plan sponsor could avoid paying flat-rate premiums on behalf of the large plan participants simply by merging it into a much smaller plan. In one case, a consultant reported that a plan sponsor was considering a strategy to establish a new plan covering only a few employees so that it could merge a large plan into the new small plan at the beginning of the next year and avoid paying flat-rate premiums on behalf of the large plan participants. These results are inconsistent with the intent of the special rule and de minimis exception.

Because of these questions, PBGC is proposing to clarify that the special rule in paragraph (e) of this section applies in the case of a beginning-of-year merger where a large plan is merged into a smaller plan. This clarification maintains the de minimis exception where a smaller plan merges into a larger plan.

### *Premium Proration for Certain Short Plan Years*

The special rule in § 4006.5(f) of PBGC's premium rates regulation allows plan administrators to pay prorated VRP and flat-rate premiums for a short plan year and lists the four circumstances that would create a short year. One of those circumstances is where the plan's assets are distributed pursuant to the plan's termination. For example, if a plan distributed its assets in a standard termination with a final short plan year covering nine months (i.e., 75 percent of a full year), the calculated premium would be reduced by 25 percent.

This rule makes sense where all accrued benefits are distributed (i.e., purchased annuities or paid lump sums) and PBGC's coverage ends. However, where a completed termination is preceded in the same year by a spinoff of a group of the plan's participants to another plan, the transferred participants remain in the insurance program and PBGC coverage of their benefits is still in effect. It has been suggested that a plan sponsor could use this rule to significantly reduce its premium obligation for the year simply by transferring most of its participants to another plan early in the plan year and then terminating what's left of the transferor plan (and, thus, owing only a pro-rata premium for its final short plan year).

In view of these considerations, PBGC is proposing to change the circumstances under which the premium is prorated for a short plan year resulting from a standard termination. The proposed rule would provide that premiums are not prorated for the year in which the plan completes a final distribution of assets in a standard termination if the plan engages in a spinoff in that same year, unless the spinoff is de minimis pursuant to the regulations under section 414(l) of the Code, i.e., generally fewer than 3 percent of the assets are spun off.

In the same paragraph, the proposed rule replaces the words "excess assets" with "residual assets under section 4044(d) of ERISA" to be consistent with the statutory language.

## **Executive Orders 12866, 13563, and 13771**

PBGC has determined that this rule is not a “significant regulatory action” under Executive Order 12866. Accordingly, this proposed rule is exempt from Executive Order 13771, and the Office of Management and Budget has not reviewed it under Executive Order 12866.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

Although this is not a significant regulatory action under Executive Order 12866, PBGC has examined the economic and policy implications of this proposed rule. Most of the proposed amendments clarify regulations and remove outdated provisions, which are neutral in their impact. A few would minimally affect the time and cost of reporting for plans and sponsors, which is discussed in the Paperwork Reduction Act section below.

Section 6 of Executive Order 13563 requires agencies to rethink existing regulations by periodically reviewing their regulatory program for rules that “may be outmoded, ineffective, insufficient, or excessively burdensome.” These rules should be modified, streamlined, expanded, or repealed as appropriate. PBGC has identified technical corrections, clarifications, and improvements to some of its regulations and have included those amendments in this proposed rulemaking. PBGC expects to propose periodic rulemakings of this nature to revise its regulations as necessary for minor technical corrections and clarifications to rules.

## Regulatory Flexibility Act

The Regulatory Flexibility Act<sup>11</sup> imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present a final regulatory flexibility analysis at the time of the publication of the final rule describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

### *Small Entities*

For purposes of the Regulatory Flexibility Act requirements with respect to this proposed rule, PBGC considers a small entity to be a plan with fewer than 100 participants. This is substantially the same criterion PBGC uses in other regulations<sup>12</sup> and is consistent with certain requirements in title I of ERISA<sup>13</sup> and the Code,<sup>14</sup> as well as the definition of a small entity that the Department of Labor has used for purposes of the Regulatory Flexibility Act.<sup>15</sup>

Thus, PBGC believes that assessing the impact of this final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business

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<sup>11</sup> 5 U.S.C. 601 *et seq.*

<sup>12</sup> *See, e.g.*, special rules for small plans under part 4007 (Payment of Premiums).

<sup>13</sup> *See, e.g.*, section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

<sup>14</sup> *See, e.g.*, section 430(g)(2)(B) of the Code, which permits single-employer plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

<sup>15</sup> *See, e.g.*, DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).



based on size standards promulgated by the Small Business Administration<sup>16</sup> under the Small Business Act. Therefore, PBGC requests comments on the appropriateness of the size standard used in evaluating the impact of the amendments in this proposed rule on small entities.

### *Certification*

Based on its definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this proposed rule would not have a significant economic impact on a substantial number of small entities. As explained above under “Executive Orders 12866, 13563, and 13771,” some of the proposed amendments reduce requirements for plans and sponsors, including for small plans, resulting in administrative savings or have a very minimal cost impact as discussed in the Paperwork Reduction Act section below. Most of the amendments clarify regulations and remove outdated provisions, which are neutral in their impact. Accordingly, as provided in section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

### **Paperwork Reduction Act**

PBGC is submitting changes to the information requirements under this proposed rule to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act (PRA). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Most of the changes PBGC expects to make are revisions to filing instructions, where necessary or helpful, to incorporate the clarifications in the proposed rule. Therefore, PBGC estimates the proposed rule would have a minimal impact on the hour and cost burden of reporting as described below.

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<sup>16</sup> See, 13 CFR 121.201.

### *Reportable Events Regulation*

The collection of information in part 4043 is approved under control number 1212-0013 (expires February 28, 2022). The current information collection requirements in part 4043 have an estimated annual hour burden of approximately 1,855 hours and a cost burden of \$439,500.

PBGC's instructions for Form 10 and Form 10-Advance would be updated to describe, as necessary or helpful, the clarifications that would be made by the proposed rule. The clarifications incorporated in the instructions would replace or augment existing language but would not create additional filing burden. However, the proposed rule would reduce reporting of active participant reduction events by eliminating the two-year lookback requirement. PBGC estimates that the approximately 180 filings it receives for active participant reduction events per year would be reduced by approximately 38 percent. Therefore, PBGC estimates that the total average annual hour burden under the proposed rule would be approximately 1,641 hours and the cost burden \$388,890.

### *Annual Financial and Actuarial Information Reporting Regulation*

The collection of information in part 4010 is approved under control number 1212-0049 (expires May 31, 2022). The current information collection requirements have an estimated annual hour burden of 532 hours and a cost burden of \$12,871,040.

PBGC's 4010 reporting e-filing instructions would be updated, as necessary or helpful, to describe the clarifications that would be made by the proposed rule. The clarifications incorporated in the instructions would replace existing language, and therefore would not create additional filing burden in these instances.

However, PBGC estimates that the proposed rule would reduce filer burden by eliminating the requirement of § 4010.9(b)(2) to provide the revenues, operating income, and net

assets for each controlled group member if a filer is submitting consolidated financial information. (See Question 2 on Schedule F, Section II, of the e-4010 module of PBGC's e-filing portal on [www.pbgc.gov](http://www.pbgc.gov).) PBGC estimates that approximately 62 percent of a projected 560 filers per year (347.2 filers) are required to file Question 2 financial information. Based on estimates of the average hour and cost burden of this requirement, PBGC estimates that by eliminating it, the proposed rule would reduce total average annual filer burden by approximately 17 hours and \$7,742. Therefore, PBGC estimates the aggregate annual hour burden under the proposed rule would be approximately 515 hours and the cost burden \$12,863,298.

#### *Termination of Single-Employer Plans Regulation*

The collection of information in part 4041 is approved under control number 1212-0036 (expires March 31, 2021). The current information collection requirements in part 4041 (which includes standard and distress terminations) have an estimated annual hour burden of 29,890 hours and a cost burden of \$5,963,400.

The proposed rule would revise § 4041.29 to provide plan administrators of plans terminating in a standard termination the option of more time to complete a PBGC Form 501. PBGC estimates up to 5 minutes of time — for those plan administrators who would choose this option — to review the instructions and send an email to PBGC's standard termination filings email address to certify that distributions have been made timely. There is no change in the information requirements contained in the PBGC Form 501.

PBGC estimates that approximately 25 percent of standard termination filers per year would choose this option. With a projected average increase in standard terminations over the current inventory, the total additional average hourly burden for this information collection would be approximately 31 hours (25 percent of 1,503 plans = 375 plans x 5 minutes per plan

(0.083 hours) = 31 hours). While PBGC projects this minimal additional time to review and send an email under the proposed new option, overall compliance for plan administrators would be eased by extending the time to file.

#### *Premium Rates Regulation*

The collection of information with respect to premiums is approved under control number 1212-0009 (expires June 30, 2021). PBGC's Comprehensive Premium Filing Instructions would be updated to reflect the changes made by the proposed rule to the premium provisions. The updates incorporated in the instructions would replace existing language and therefore would not create additional filing burden.

#### **List of Subjects**

##### **29 CFR Part 4001**

Business and industry, Organization and functions (Government agencies), Pension insurance, Pensions, Small businesses.

##### **29 CFR Part 4006**

Employee benefit plans, Pension insurance.

##### **29 CFR Part 4010**

Pension insurance, Pensions, Reporting and recordkeeping requirements.

##### **29 CFR Part 4041**

Employee benefit plans, Pension insurance, Pensions.

##### **29 CFR Part 4043**

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, PBGC proposes to amend 29 CFR parts 4001, 4006, 4010, 4041, and 4043 as follows:

## PART 4001 — TERMINOLOGY

- 1. The authority citation for part 4001 continues to read as follows:

**Authority:** 29 U.S.C. 1301, 1302(b)(3).

- 2. Amend § 4001.2 by adding in alphabetical order, the definitions “U.S. entity” and “Ultimate parent” to read as follows:

### § 4001.2 Definitions

\* \* \* \* \*

*U.S. entity* means an entity subject to the personal jurisdiction of the U.S. district courts.

*Ultimate parent* means the parent at the highest level in the chain of corporations and/or other organizations constituting a parent-subsidary controlled group.

\* \* \* \* \*

## PART 4006 — PREMIUM RATES

- 3. The authority citation for part 4006 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1306, 1307.

- 4. Amend § 4006.4 by revising paragraph (f) to read as follows:

### § 4006.4 Determination of unfunded vested benefits.

\* \* \* \* \*

(f) *Plans to which special funding rules apply.* The following statutory provisions are disregarded for purposes of determining unfunded vested benefits (whether the standard premium funding target or the alternative premium funding target is used):

(1) Section 402(b) of the Pension Protection Act of 2006, Public Law 109-280, dealing with certain frozen plans of commercial passenger airlines and airline caterers.

(2) Section 306 of ERISA and section 433 of the Code, dealing with certain defined benefit pension plans maintained by certain cooperatives and charities.

■ 5. In § 4006.5:

- a. Revise paragraphs (a) and (a)(3);
- b. Redesignate paragraph (a)(4) as paragraph (a)(5);
- c. Add a new paragraph (a)(4); and
- d. Revise paragraphs (e) and (f)(3).

The revisions and addition read as follows:

**§ 4006.5 Exemptions and special rules.**

(a) *Variable-rate premium exemptions.* A plan described in any of paragraphs (a)(1) through (5) of this section is not required to determine or report its unfunded vested benefits under § 4006.4 and does not owe a variable-rate premium under § 4006.3(b).

\* \* \* \* \*

(3) *Certain plans completing a standard termination.* A plan is described in this paragraph if it —

- (i) Makes a final distribution of assets in a standard termination during the premium payment year, and
- (ii) Did not engage in a spinoff during the premium payment year, unless the spinoff is de minimis pursuant to the regulations under section 414(l) of the Code.

(4) *Certain plans in the process of completing a standard termination initiated in a prior year.* A plan is described in this paragraph if —

- (i) The plan administrator has issued notices of intent to terminate the plan in a standard termination in accordance with section 4041(a)(2) of ERISA;

(ii) The proposed termination date set forth in the notice of intent to terminate is before the beginning of the premium payment year; and

(iii) The plan ultimately makes a final distribution of plan assets in conjunction with the plan termination.

\* \* \* \* \*

(e) *Participant count date; certain transactions.* (1) The participant count date of a plan described in paragraph (e)(2) or (3) of this section is the first day of the premium payment year.

(2) With respect to a transaction where some, but not all, of the assets and liabilities of one plan (the “transferor plan”) are transferred into another plan (the “transferee plan”) —

(i) The transferor plan if the spinoff is not de minimis and is effective at the beginning of the transferor plan’s premium payment year; and

(ii) The transferee plan if the transferor plan meets the criteria in paragraph (e)(2)(i) of this section and the transfer occurs at the beginning of the transferee plan’s premium payment year.

(3) With respect to a merger effective at the beginning of the premium payment year, the transferee plan if —

(i) The merger is not de minimis; or

(ii) The assets of the transferee plan immediately before the merger are less than the total assets transferred to the transferee plan in the merger.

(4) For purposes of this paragraph (e), “de minimis” has the meaning described in regulations under section 414(l) of the Code (for single-employer plans) or in part 4231 of this chapter (for multiemployer plans).

(f) \* \* \*

(3) *Distribution of assets.* The plan's assets (other than any residual assets under section 4044(d) of ERISA) are distributed pursuant to the plan's termination, but only if the plan did not engage in a spinoff during the plan year, unless the spinoff is de minimis pursuant to the regulations under section 414(l) of the Code.

\* \* \* \* \*

## **PART 4010 — ANNUAL FINANCIAL AND ACTUARIAL INFORMATION REPORTING**

■ 6. The authority citation for part 4010 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1310.

■ 7. In § 4010.2:

- a. Amend the introductory text by removing “and” and adding at the end of the sentence “, ultimate parent, and U.S. entity”.
- b. Add, in alphabetical order, the definition “Foreign entity” to read as follows:

### **§ 4010.2 Definitions.**

\* \* \* \* \*

*Foreign entity* means a member of a controlled group that —

- (1) Is not a contributing sponsor of a plan;
- (2) Is not organized under the laws of (or, if an individual, is not a domiciliary of) any state (as defined in section 3(10) of ERISA); and
- (3) For the fiscal year that includes the information year, meets one of the following tests —
  - (i) Is not required to file any United States Federal income tax form;



(ii) Has no income reportable on any United States Federal income tax form other than passive income not exceeding \$1,000; or

(iii) Does not own substantial assets in the United States (disregarding stock of a member of the plan's controlled group) and is not required to file any quarterly United States income tax returns for employee withholding.

\* \* \* \*

■ 8. Amend § 4010.4 by revising paragraph (e) to read as follows:

**§ 4010.4 Filers.**

\* \* \* \*

(e) *Certain plans to which special funding rules apply.* Except for purposes of determining the information to be submitted under § 4010.8(h) (in connection with the actuarial valuation report), the following statutory provisions are disregarded for purposes of this part:

(1) Section 402(b) of the Pension Protection Act of 2006, Public Law 109-280, dealing with certain frozen plans of commercial passenger airlines and airline caterers.

(2) Section 306 of ERISA and section 433 of the Code, dealing with certain defined benefit pension plans maintained by certain cooperatives and charities.

■ 9. Amend § 4010.7 by revising paragraph (a) to read as follows:

**§ 4010.7 Identifying information.**

(a) *Filers.* Each filer is required to provide, in accordance with the instructions on PBGC's website, <http://www.pbgc.gov>, the following identifying information with respect to each member of the filer's controlled group (excluding exempt entities)—

(1) *Current members; individual member information.* For each entity that is a member of the controlled group as of the end of the filer's information year—

- (i) The name, address, and telephone number of the entity;
- (ii) The nine-digit Employer Identification Number (EIN) assigned by the IRS to the entity (or if there is no EIN for the entity, an explanation); and
- (iii) If the entity became a member of the controlled group during the information year, the date the entity became a member of the controlled group.

(2) *Current members; legal relationships of members.* If, as of the end of the filer's information year, the filer's controlled group consists of —

(i) More than ten members, an organization chart or other diagram showing the members of the filer's controlled group as of the end of the filer's information year and the legal relationships of the members to each other.

(ii) Ten or fewer members, the legal relationship of each entity to the plan sponsor (for example, parent, subsidiary).

(3) *Former members.* For any entity that ceased to be a member of the controlled group during the filer's information year, the date the entity ceased to be a member of the controlled group and the identifying information required by paragraph (a)(1) of this section as of the day before the entity left the controlled group.

\* \* \* \* \*

■ 10. Amend § 4010.8 by revising paragraphs (d)(2) and (3) to read as follows:

**§ 4010.8 Plan actuarial information.**

\* \* \* \* \*

(d) \* \* \*

(2) *Actuarial assumptions and methods.* The value of benefit liabilities must be determined using the rules in paragraphs (d)(2)(i) through (iii) of this section.

(i) *Benefits to be valued.* Benefits to be valued include all benefits earned or accrued under the plan as of the end of the plan year ending within the information year and other benefits payable from the plan including, but not limited to, ancillary benefits and retirement supplements, regardless of whether such benefits are protected by the anti-cutback provisions of section 411(d)(6) of the Code.

(ii) *Actuarial assumptions.* The value of benefit liabilities must be determined using the actuarial assumptions described in the following table:

Table 1 to paragraph (d)(2)(ii)

<b>Actuarial assumptions table to paragraph (d)(2)(ii) of this section</b>			
<b>Assumptions</b>	<b>As prescribed in accordance with</b>		
<b>Interest</b>	§ 4044.52(a)		
<b>Form of payment</b>	§ 4044.51		
<b>Expenses</b>	§ 4044.52(d)		
<b>Decrements</b>			
• Mortality	§ 4044.53		
• Retirement	§§ 4044.55 - 4044.57		
• Other (e.g., turnover, disability)	<p>Either Option 1 or Option 2 —</p> <table> <tr> <td> <p><b>Option 1</b></p> <p>Disregard (i.e., assume 0% probability of decrements other than mortality or retirement occurring).</p> </td><td> <p><b>Option 2</b></p> <p>Use the same assumptions as used to determine the minimum required contribution under section 303 of ERISA and section 430 of the Code for the plan year ending within the filer's information year.</p> <p>If there is no distinction between termination and retirement assumptions, reflect only rates for ages before the Earliest PBGC Retirement Date (as defined in § 4022.10 of this chapter).</p> </td></tr> </table>	<p><b>Option 1</b></p> <p>Disregard (i.e., assume 0% probability of decrements other than mortality or retirement occurring).</p>	<p><b>Option 2</b></p> <p>Use the same assumptions as used to determine the minimum required contribution under section 303 of ERISA and section 430 of the Code for the plan year ending within the filer's information year.</p> <p>If there is no distinction between termination and retirement assumptions, reflect only rates for ages before the Earliest PBGC Retirement Date (as defined in § 4022.10 of this chapter).</p>
<p><b>Option 1</b></p> <p>Disregard (i.e., assume 0% probability of decrements other than mortality or retirement occurring).</p>	<p><b>Option 2</b></p> <p>Use the same assumptions as used to determine the minimum required contribution under section 303 of ERISA and section 430 of the Code for the plan year ending within the filer's information year.</p> <p>If there is no distinction between termination and retirement assumptions, reflect only rates for ages before the Earliest PBGC Retirement Date (as defined in § 4022.10 of this chapter).</p>		
<b>Cash balance plan account conversions</b>	Section 204(b)(5)(B)(vi) of ERISA and section 411(b)(5)(B)(vi) of the Code (which deal with the interest crediting rate and annuity conversion rates), as if the plan terminated on the last day of the plan year ending within the		

(iii) *Future service.* Future service expected to be accrued by an active participant in an ongoing plan during future employment (based on the assumptions used to determine benefit liabilities) must be included in determining the earliest and unreduced retirement ages used to determine the expected retirement age and in determining an active participant's entitlement to early retirement subsidies and supplements at the expected retirement age. See the examples in paragraph (e) of this section.

(3) *Special actuarial assumptions for exempt plan determination.* Solely for purposes of determining whether a plan is an exempt plan for an information year, the value of benefit liabilities may be determined by substituting the retirement age assumptions in paragraph (d)(2) of this section for the retirement age assumptions used by the plan for minimum funding purposes for the plan year ending within the information year without regard to the at-risk assumptions of section 303(i) of ERISA and section 430(i) of the Code.

\* \* \* \* \*

■ 11. Amend § 4010.9 by removing “Web site” and adding in its place “website” in paragraph (a) and revising paragraphs (b), (d), and (e) to read as follows:

**§ 4010.9 Financial information.**

\* \* \* \* \*

(b) *Consolidated financial statements.* If the financial information of a controlled group member is combined with the information of other group members in consolidated financial statements, a filer may provide the following financial information in lieu of the information required in paragraph (a) of this section —

(1) The audited consolidated financial statements for the controlled group for the filer's information year or, if the audited consolidated financial statements are not available by the date specified in § 4010.10(a), unaudited consolidated financial statements for the fiscal year ending within the information year; and

(2) If the ultimate parent of the controlled group is a foreign entity, financial information on the U.S. entities (other than an exempt entity) that are members of the controlled group. The information required by this paragraph (b)(2) may be provided in the form of consolidated financial statements if the financial information of each controlled group member that is a U.S. entity is combined with the information of other group members that are U.S. entities. Otherwise, for each U.S. entity that is a controlled group member, provide the financial information required in paragraph (a) of this section.

\* \* \* \* \*

(d) *Submission of public information.* If any of the financial information required by paragraphs (a) through (c) of this section is publicly available, the filer, in lieu of submitting such information to PBGC, may include a statement with the other information that is submitted to PBGC indicating when such financial information was made available to the public and where PBGC may obtain it (including the URL and title of the web page if applicable). For example, if the controlled group member has filed audited financial statements with the Securities and Exchange Commission, it need not file the financial statements with PBGC but instead can identify the SEC filing and the URL and title of the SEC web page where the filing can be retrieved as part of its submission under this part.

(e) *Inclusion of information about non-filers and exempt entities.* Consolidated financial statements provided pursuant to paragraph (b) of this section may include financial information of persons who are not controlled group members (e.g., joint ventures) or are exempt entities.

■ 12. In § 4010.11:

- a. Revise paragraphs (a) and (a)(1);
- b. Add “on the last day of the information year” after the words “controlled group” in the first sentence in paragraph (b)(1);
- c. Redesignate paragraph (d) as paragraph (e); and
- d. Add a new paragraph (d).

The revisions and addition read as follows:

**§ 4010.11 Waivers.**

(a) *Aggregate funding shortfall not in excess of \$15 million waiver.* Unless reporting is required by § 4010.4(a)(2) or (3), reporting is waived for a person (that would be a filer if not for the waiver) for an information year if, for the plan year ending within the information year, the aggregate 4010 funding shortfall for all plans (including any exempt plans) maintained by the person's controlled group on the last day of the information year (disregarding those plans with no 4010 funding shortfall) does not exceed \$15 million, as determined under paragraphs (a)(1) and (2) of this section.

(1) *4010 funding shortfall; in general.* A plan's 4010 funding shortfall for a plan year equals the funding shortfall for the plan year as provided under section 303(c)(4) of ERISA and section 430(c)(4) of the Code, with the following exceptions:

(i) The funding target used to calculate the 4010 funding shortfall is determined without regard to the interest rate stabilization provisions of section 303(h)(2)(C)(iv) of ERISA

and section 430(h)(2)(C)(iv) of the Code, and except for a plan that is in at-risk status for minimum funding purposes for the plan year ending within the filer's information year, without regard to the rules in section 303(i)(1) of ERISA and section 430(i)(1) of the Code.

(ii) The value of plan assets used to calculate the 4010 funding shortfall is determined without regard to the reduction under section 303(f)(4)(B) of ERISA and section 430(f)(4)(B) of the Code (dealing with reduction of assets by the amount of prefunding and funding standard carryover balances).

\* \* \* \* \*

(d) *4010 funding target attainment percentage below 80 percent because of late election to waive a funding balance.* If reporting is required solely under § 4010.4(a)(1), reporting is waived for a person (that would be a filer if not for the waiver) for an information year if, for the plan year ending within the information year, for any plan (including an exempt plan) maintained by the members of the contributing sponsor's controlled group with a 4010 funding target attainment percentage below 80 percent, each such plan —

(1) Would have had a 4010 funding target attainment percentage for that plan year of 80 percent or more if a timely election to reduce a funding balance pursuant to section 303(f)(5) of ERISA and section 430(f)(5) of the Code had been made; and

(2) Such an election was made after the applicable deadline and before the due date of the 4010 filing.

\* \* \* \* \*

## **PART 4041 — TERMINATION OF SINGLE-EMPLOYER PLANS**

■ 13. The authority citation for part 4041 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1341, 1344, 1350.

■ 14. Revise § 4041.29 to read as follows:

**§ 4041.29 Post-distribution certification.**

(a) *Filing requirement.* The plan administrator must either —

(1) Within 30 days after the last distribution date for any affected party, file with PBGC a post-distribution certification (PBGC Form 501), completed in accordance with the instructions thereto; or

(2)(i) Within 30 days after the last distribution date for any affected party, certify to PBGC, in the manner prescribed in the instructions to PBGC Form 501, that the plan assets have been distributed as required, and

(ii) Within 60 days after the last distribution date for any affected party, file a post-distribution certification (PBGC Form 501), completed in accordance with the instructions thereto.

(b) *Assessment of penalties.* PBGC will assess a penalty for a late filing under paragraph (a) of this section only to the extent the completed PBGC Form 501 is filed more than 90 days after the distribution deadline (including extensions) under § 4041.28(a).

■ 15. Amend § 4041.30 by revising paragraph (d)(2) to read as follows:

**§ 4041.30 Requests for deadline extensions.**

\* \* \* \* \*

(d) \* \* \*

(2) *Post-distribution deadlines.* Extend the filing deadline under § 4041.29(a).

**PART 4043 — REPORTABLE EVENTS AND CERTAIN OTHER NOTIFICATION REQUIREMENTS**



- 16. The authority citation for part 4043 continues to read as follows:

**Authority:** 29 U.S.C. 1083(k), 1302(b)(3), 1343.

**§ 4043.2 [Amended]**

- 17. Amend § 4043.2 by removing “and” and adding in its place “, ultimate parent, and U.S. entity” in the introductory text, and removing the definition “*U.S. entity*.”

**§ 4043.3 [Amended]**

- 18. Amend § 4043.3(c) by removing “Web site” and adding in its place “website”.

**§ 4043.9 [Amended]**

- 19. Amend § 4043.9(e)(2)(i) by adding “third party” after “available”.
- 20. Revise § 4043.23 to read as follows:

**§ 4043.23 Active participant reduction.**

(a) *Reportable event.* A reportable event occurs for a plan:

(1) *Single-cause event.* (i) On each date in a plan year when, as a result of a new single cause, the ratio of the aggregate number of individuals who ceased to be active participants because of that single-cause, to the number of active participants at the beginning of such plan year, exceeds 20 percent.

(ii) Examples of single-cause events include a reorganization or restructuring, the discontinuance of an operation or business, a natural disaster, a mass layoff, or an early retirement incentive program.

(2) *Attrition event.* At the end of a plan year if the sum of the number of active participants covered by the plan at the end of such plan year, plus the number of individuals who ceased to be active participants during the same plan year that are reported to PBGC under

paragraph (a)(1) of this section, is less than 80 percent of the number of active participants at the beginning of such plan year.

(b) *Determination rules--(1) Determination dates.* The number of active participants at the beginning of a plan year may be determined by using the number of active participants at the end of the previous plan year, and the number of active participants at the end of a plan year may be determined by using the number of active participants at the beginning of the next plan year.

(2) *Active participant.* “Active participant” means a participant who —

(i) Is receiving compensation from any member of the plan’s controlled group for work performed for any member of the plan’s controlled group;

(ii) Is on paid or unpaid leave granted for a reason other than a layoff;

(iii) Is laid off from work for a period of time that has lasted less than 30 days; or

(iv) Is absent from work due to a recurring reduction in employment that occurs at least annually.

(3) *Employment relationship.* For purposes of determining whether a participant is an active participant, a participant does not cease to be active if the person leaves employment with one member of a plan's controlled group to become employed by another controlled group member.

(c) *Reductions due to cessations and withdrawals.* For purposes of paragraph (a) of this section, a reduction in the number of active participants is to be disregarded to the extent that it—

(1) Is attributable to an event described in sections 4062(e) or 4063(a) of ERISA, and

(2) Is timely reported to PBGC under section 4062(e) and/or section 4063(a) of ERISA prior to the timely filing of the notice required by paragraph (a) of this section.

(d) *Waivers--(1) Small plan.* Notice under this section is waived if the plan had 100 or fewer participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(2) *Low-default-risk.* Notice under this section is waived if each contributing sponsor of the plan and the highest level U.S. parent of each contributing sponsor are low-default-risk on the date of the event.

(3) *Well-funded plan.* Notice under this section is waived if the plan is in the well-funded plan safe harbor for the event year.

(4) *Public company.* Notice under this section is waived if any contributing sponsor of the plan before the transaction is a public company and the contributing sponsor timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits).

(5) *Statutory events.* Notice is waived for an active participant reduction event described in section 4043(c)(3) of ERISA except to the extent required under this section.

(e) *Extension — attrition event.* For an event described in paragraph (a)(2) of this section, the notice date is extended until the premium due date for the plan year following the event year.

(f) *Examples--(1) Determining whether a single-cause event occurred (Example 1).* A calendar-year plan had 1,000 active participants at the beginning of the current plan year. As the result of a business unit being shut down, 160 participants are permanently laid off on July 30. Prior to July 30, and as part of the course of regular business operations, some active participants terminated employment, some retired and some new hires became covered by the plan. Because

reductions due to attrition are disregarded for purposes of determining whether a single-cause event has occurred, it is not necessary for the sponsor to tabulate an exact active participant count as of July 30. Rather, the relevant percentage for determining whether a single-cause event occurred is determined by dividing the number of active participants laid-off as a result of the business unit shut down to the beginning of year active participant count. Because that ratio is less than 20 percent (i.e.,  $160/1,000 = .16$ , or 16 percent), a single-cause event under paragraph (a)(1) of this section did not occur on July 30. However, if, as a result of the business unit shutdown, additional layoffs occur later in the same year, a single-cause event may subsequently be triggered (See Example 3).

(2) *Determining whether an attrition event occurred in year when a single-cause event occurred (Example 2).* — (i) Assume the same facts as in Example 1 except that the number of active participants laid off on July 30 was 230 and thus, a single-cause event occurred. Further, assume that the event was timely reported to PBGC (i.e., on or before August 30). Lastly, assume the active participant count as of year-end is 600.

(ii) To prevent duplicative reporting (i.e., to ensure that the participants who triggered a single-cause reporting requirement do not also trigger an attrition event), the 230 participants who triggered that single-cause reporting requirement are not taken into account for purposes of determining whether an attrition event occurred. This is accomplished by increasing the year-end count by 230. Therefore, the applicable percentage for the attrition determination is 83 percent (i.e.,  $(600 + 230)/1,000 = .83$ ). Because 83 percent is greater than 80 percent, an attrition event has not occurred.

(3) *Single-cause event spread out over multiple dates (Example 3).* (i) Assume the same facts as in Example 1 except that the layoffs resulting from the business unit shut down are spread out over several months. The following table summarizes the applicable calculations:

Table 1 to paragraph (f)(3)

<b>Single-cause event spread out over multiple dates</b>			
Date	Number laid-off	Aggregate Reduction	Applicable Percentage
February 1	50	50	$50/1,000 = 5$ percent
May 15	50	100	$100/1,000 = 10$ percent
September 1	110	210	$210/1,000 = 21$ percent
November 1	40	250	$250/1,000 = 25$ percent

(ii) A single-cause event occurs on September 1 because that is the first time the applicable percentage exceeds 20 percent. This event must be reported by October 1. The November 1 layoff does not trigger a subsequent single-cause event because the layoff does not amount to an additional 20 percent decline in active participants. However, they will be considered in the determination of whether an attrition event occurs at year-end as explained in paragraph (f)(3)(iii) of this section.

(iii) As illustrated in paragraph (f)(2) of this section (Example 2), for purposes of determining whether an attrition event has occurred, the year-end count is increased by the number of participants that triggered a single-cause event. In this case, that number is 210. The fact that an additional 40 active participants were laid off as a result of the business unit shut down after the single-cause event occurred does not affect the calculation because it was not already reported to PBGC. For example, if the year-end active participant count is 560, the

number that gets compared to the beginning-of-year active participant count is 770 (i.e.,  $560 + 210 = 770$ ). Because 770 is less than 80 percent of 1,000, an attrition event has occurred and must be reported.

(4) *Multiple single-cause events in same plan year (Example 4).* Assume the same facts as in Example 1 except that the July 30 shutdown of the business unit resulted in 205 layoffs on that date. A single-cause event occurred and is timely reported. Later in the same plan year, the company announces an early retirement incentive program and 210 employees participate in the program with the last employees participating in the program retiring on November 15 of the plan year. A new single-cause event has occurred as of November 15 resulting in a reporting obligation of the active participant reduction due to the retirement incentive program ( $210/1000 = 21$  percent).

■ 21. Amend § 4043.26 by revising paragraph (a)(1) to read as follows:

**§ 4043.26 Inability to pay benefits when due.**

(a) \* \* \*

(1) *Current inability.* A plan is currently unable to pay benefits if it fails to provide any participant or beneficiary the full benefits to which the person is entitled under the terms of the plan, at the time the benefit is due and in the form in which it is due. A plan is not treated as being currently unable to pay benefits if its failure to pay is caused solely by —

(i) A limitation under section 436 of the Code and section 206(g) of ERISA (dealing with funding-based limits on benefits and benefit accruals under single-employer plans),

(ii) The need to verify a person's eligibility for benefits,

(iii) The inability to locate a person, or

(iv) Any other administrative delay, to the extent that the delay is for less than the shorter of two months or two full benefit payment periods.

\* \* \* \* \*

**§ 4043.29 Change in contributing sponsor or controlled group.**

■ 22. Amend § 4043.29 by revising paragraphs (a) and (c) to read as follows:

(a) *Reportable event.* (1) A reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons' ceasing to be a —

(i) Contributing sponsor of the plan, or

(ii) Member of the plan's controlled group (other than by merger involving members of the same controlled group).

(2) For purposes of this section, the term “transaction” includes, but is not limited to, a legally binding agreement, whether or not written, to transfer ownership, an actual transfer of ownership, and an actual change in ownership that occurs as a matter of law or through the exercise or lapse of pre-existing rights. Whether an agreement is legally binding is to be determined without regard to any conditions in the agreement. A transaction that does not involve a change in contributing sponsor described in this paragraph (a) is not reportable if it will result solely in a reorganization involving a mere change in identity, form, or place of organization, however effected.

\* \* \* \* \*

(c) *Examples.* The following examples assume that no waiver applies.

(1) *Controlled group breakup.* Company A (the contributing sponsor of Plan A), and Company B (the contributing sponsor of Plan B) are in the same controlled group with Parent Company AB. On March 31, Parent Company AB and Company C enter into an agreement to

sell the stock of Company B to Company C, a company outside of the controlled group. The transaction will close on August 31 and Company B will continue to maintain Plan B. Both Company A (Plan A's contributing sponsor) and the plan administrator of Plan A are required to report that Company B will leave Plan A's controlled group. Company B (Plan B's contributing sponsor) and the plan administrator of Plan B are required to report that Company A and Parent Company AB are no longer part of Plan B's controlled group. Both reports are due on April 30, 30 days after they entered into the agreement to sell Company B.

(2) *Change in contributing sponsor.* Plan Q is maintained by Company Q. Company Q enters into a binding contract to sell a portion of its assets and to transfer employees participating in Plan Q, along with Plan Q, to Company R, which is not a member of Company Q's controlled group. There will be no change in the structure of Company Q's controlled group. On the effective date of the sale, Company R will become the contributing sponsor of Plan Q. A reportable event occurs on the date of the transaction (i.e., the date the binding contract was executed), because as a result of the transaction, Company Q (and any other member of its controlled group) will cease to be a member of Plan Q's controlled group. The event is not reported before the notice date. If on the notice date the change in the contributing sponsor has not yet become effective, Company Q has the reporting obligation. If the change in the contributing sponsor has become effective by the notice date, Company R has the reporting obligation.

(3) *Dissolution of controlled group member.* Company A (which maintains Plan A) and Company B are in the same controlled group with Parent Company AB. Pursuant to an asset sale agreement, Company B sells its assets to a company outside of the controlled group. After the sale, Company B will be dissolved and no longer operating. Since Company B will no



longer be a member of Plan A's controlled group, a reportable event occurs on the date Company B enters into the asset sale agreement. Note that this event may also be required to be reported as a liquidation event under 29 CFR 4043.30.

(4) *Merger of controlled group members.* Company A (which maintains Plan A) and Company B are in the same controlled group with Parent Company AB. Parent Company AB decides to merge the operations of Company B into Company A. Although Company B will no longer be a member of Plan A's controlled group, no report is due given Company B is merging with Company A.

■ 23. Revise § 4043.30 to read as follows:

**§ 4043.30 Liquidation.**

(a) *Reportable event.* A reportable event occurs for a plan when a member of the plan's controlled group —

(1) Resolves to cease all revenue-generating business operations, sell substantially all its assets, or otherwise effect or implement its complete liquidation (including liquidation into another controlled group member) by decision of the member's board of directors (or equivalent body such as the managing partners or owners) or other actor with the power to authorize such cessation of operations, sale, or a liquidation, unless the event would be reported under paragraph (a)(2) or (3) of this section;

(2) Institutes or has instituted against it a proceeding to be dissolved or is dissolved, whichever occurs first; or

(3) Liquidates in a case under the Bankruptcy Code, or under any similar law.

(b) *Waivers--(1) De minimis 10-percent segment.* Notice under this section is waived if the person or persons that liquidate under paragraph (a) of this section do not include any

contributing sponsor of the plan and represent a de minimis 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity.* Notice under this section is waived if each person that liquidates under paragraph (a) of this section is a foreign entity other than a foreign parent.

(3) *Reporting under insolvency event.* Notice under this section is waived if reporting is also required under § 4043.35(a)(3) or (4) and notice has been provided to PBGC for the same event under that section.

(c) *Public company extension.* If any contributing sponsor of the plan is a public company, notice under this section is extended until the earlier of —

(i) The date the contributing sponsor timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits); or

(ii) The date when a press release with respect to the liquidation described under paragraph (a) of this section is issued.

(d) *Examples--(1) Liquidation within a controlled group.* Plan A's controlled group consists of Company A (its contributing sponsor), Company B, Company Q (the parent of Company A and Company B). Company B represents the most significant portion of cash flow for the controlled group. Company B experiences an unforeseen event that negatively impacts operations and results in an increase in debt. The controlled group liquidates Company B by ceasing all operations, settling its debts, and merging any remaining assets into Company Q. (For purposes of this example, it does not matter under which subparagraph of paragraph (a) of this section reporting is triggered). The transaction is to be treated as a tax-free liquidation for

tax purposes. Both Company A (Plan A's contributing sponsor) and the plan administrator of Plan A are required to report that Company B will liquidate within the controlled group.

(2) *Cessation of Operations.* Plan A is sponsored by Company A. The owners of Company A decide to cease all revenue-generating operations. Certain administrative employees will wind down the business and continue to be employed until the wind down is complete, which could take several months. Company A is required to report a liquidation reportable event 30 days after the decision is made to cease all revenue-generating operations.

(3) *Sale of Assets.* Plan A is sponsored by Company A. In a meeting of the Board of Directors of Company A, the Board resolves to sell all the assets of Company A to Company B. Under the asset sale agreement with Company B, Company B will not assume Plan A; Company A expects to undertake a standard termination of Plan A. Company A is required to report a liquidation event 30 days after the Board resolved to sell the assets of Company A.

■ 24. Amend § 4043.35 by adding paragraph (b)(3) to read as follows:

**§ 4043.35 Insolvency or similar settlement.**

\* \* \* \* \*

(b) \* \* \*

(3) *Liquidation event.* Notice under paragraph (a)(3) or (4) of this section is waived if reporting is also required under § 4043.30 and notice has been provided to PBGC for the same event under that section.

**§ 4043.81 [Amended]**

■ 25. Amend § 4043.81 by removing paragraph (c).

Issued in Washington DC by

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